Elsie Chong Suk Mee @ Mrs Suresh Janardanan v RHB Bank (formerly known as United Malayan Banking Corp)

COURT OF APPEAL (BRUNEI DARUSSALAM) — CIVIL APPEAL NO 8 OF 2009
MORTIMER PCA, DAVIES AND ROGERS JJCA
1 JUNE 2010

Contract — Construction of terms of contract — Construction of participation agreement — Whether agreement merely created trust — Whether agreement conferred any legal interest and/or title — Whether beneficiary of trust empowered to direct suit by trustee — Whether agreement could be construed through powers conferred by relevant statute

Statutory Interpretation — Construction of statutes — Power given by Act — Power to acquire and dispose assets under Part V of the Pengurusan Danaharta Nasional Berhad Act 1998 — Whether Part V only applied to assets acquired by Danaharta

The respondent had granted the second defendant ('the appellant') credit facilities secured by a charge over the first defendant's property. The first defendant executed a power of attorney in the respondent's favour allowing it to deal with the property. The appellant defaulted in her repayments and on 4 January 1996, the respondent obtained judgment for the outstanding sum. The appellant made partial repayment but remained substantially in default. On 11 October 1999, the respondent executed a 'Participation Agreement' ('the agreement') with Danaharta Managers Sdn Bhd ('Danaharta') — a Malaysian company established under the Pengurusan Danaharta Nasional Berhad Act 1998 ('the Act'). Pursuant to the agreement, the respondent assigned to Danaharta the risks and benefits in respect of several outstanding loans, including the appellant's loan. Danaharta in turn assigned its rights under the agreement to one Hickham Sdn Bhd ('Hickham') — another Malaysian company. On 20 August 2009, the High Court, inter alia, allowed the respondent's application to enforce the charge over the first defendant's property. The appellant appealed against the High Court's decision contending inter alia that the proceedings were incompetent because neither Danaharta nor Hickham, who had become owners of the appellant's debt, had been made parties, and being unregistered entities in Brunei they could not sue in Brunei. The appellant also submitted that the respondent having sold the debt, no longer retained the right to sue.

Held, dismissing the appeal with costs:

(1) The appellant had failed to stay the judgment appealed from, entitling

the respondent to sell the property. There could not be any effective appeal against the declaration or the orders relating to the sale of the property. However, there could still be an appeal against the order for possession (see paras 11 & 13).

(2) The agreement created a trust in favour of Danaharta of the beneficial interest in the debt owed to the respondent by the appellant and in the respondent's rights under the charge and power of attorney in favour of the respondent. The beneficial interest in each passed to Danaharta but the legal interest remained with the respondent. It conferred no right on Danaharta against either defendant (see para 16).

(3) As the holder of the whole beneficial interest in the charge and power of attorney, Danaharta could direct the respondent to act under any one of those documents, but with the respondent remaining as legal owner of the debt and the rights, as per the intention of the parties in the agreement (see para 20).

(4) The Act could not be used to construe the agreement. Part V of the Act applies only to assets acquired by Danaharta, which in the instant case was the beneficial and not the legal interest in the appellant's debt, charge and power of attorney. Whereas counsel sought to construe the agreement by reference to the powers conferred on Danaharta under the Act, the Act could only operate in respect of assets which Danaharta had agreed to acquire (see paras 21–22).

(5) In the instant case, there was no promise to assign legal title. Although the agreement created an absolute trust in favour of Danaharta, entitling it to the rights under the charge and power of attorney, it did not entitle Danaharta to specific performance of a transfer of the debt or of the rights under the documents (see para 26); *Three Rivers District Council and others v Governor and Company of the Bank of England* [1996] QB 292 (not followed).

[Bahasa Malaysia summary

Responden telah memberikan defendan kedua ('perayu') kemudahan kredit yang dijamin oleh caj terhadap hartanah defendan pertama. Defendan pertama melaksanakan surat kuasa wakil dengan memihak kepada responden membenarkan ia untuk berurusan dengan hartanah tersebut. Perayu ingkar dalam pembayaran baliknya dan pada 4 Januari 1996, responden memperoleh penghakiman untuk jumlah yang belum dijelaskan. Perayu membuat pembayaran separa tetapi sebahagian besarnya masih tertunggak. Pada 11 Oktober 1999, responden melaksanakan 'participation agreement' ('perjanjian') dengan Danaharta Managers Sdn Bhd ('Danaharta') syarikat Malaysia yang ditubuhkan di bawah Akta Pengurusan Danaharta Nasional Berhad 1998 ('Akta'). Berikutan perjanjian, responden meletakhakkan kepada Danaharta risiko dan faedah berkaitan beberapa pinjaman yang belum

dijelaskan, termasuk pinjaman perayu. Danaharta pula meletakhakkan haknya di bawah perjanjian tersebut kepada Hickham Sdn Bhd ('Hickham') syarikat Malaysia yang satu lagi. Pada 20 Ogos 2009, Mahkamah Tinggi, antara lain, membenarkan permohonan responden untuk menguatkuasakan caj terhadap hartanah defendan pertama. Perayu merayu terhadap keputusan Mahkamah Tinggi dengan berhujah bahawa prosiding tersebut tidak kompeten kerana bukan Danaharta ataupun Hickham, yang menjadi pemilik hutang perayu, dimasukkan sebagai pihak-pihak, dan sebagai entiti yang tidak didaftarkan di Brunei mereka tidak dapat menyaman di Brunei. Perayu juga berhujah bahawa responden yang telah menjual hutangnya, tidak mempunyai lagi hak untuk menyaman.

Diputuskan, menolak rayuan dengan kos:

(1) Perayu gagal untuk menangguhkan penghakiman yang dirayu, memberikan hak kepada responden untuk menjual hartanah tersebut. Tidak akan terdapat rayuan efektif terhadap perisytiharan atau perintah-perintah berkaitan jualan hartanah tersebut. Walau bagaimanapun, masih terdapat rayuan terhadap perintah untuk pemilikan (lihat perenggan 11 & 13).

(2) Perjanjian membentuk amanah dengan memihak kepada Danaharta terhadap kepentingan benefisial dalam hutang yang belum dibayar kepada responden oleh perayu dan dalam hak responden di bawah caj dan surat kuasa wakil yang memihak kepada responden. Kepentingan benefisial dalam setiap satu diletakkan ke atas Danaharta tetapi kepentingan undang-undang kekal dengan responden. Ia tidak memberikan hak kepada Danaharta terhadap kedua-dua defendan (lihat perenggan 16).

(3) Sebagai pemegang kesemua kepentingan benefisial di dalam caj dan surat kuasa wakil, Danaharta boleh mengarahkan responden untuk bertindak di bawah salah satu daripada dokumen-dokumen tersebut, tetapi dengan responden kekal sebagai pemilik sah hutang dan hak, seperti niat pihak-pihak di dalam perjanjian (lihat perenggan 20).

(4) Akta tidak dapat digunakan untuk mentafsir perjanjian tersebut. Bahagian V Akta hanya diguna pakai kepada aset yang diperoleh oleh Danaharta, yang mana dalam kes ini adalah benefisial dan bukan kepentingan undang-undang dalam hutang perayu, caj dan surat kuasa wakil. Sebaliknya peguamcara memohon untuk mentafsirkan perjanjian tersebut dengan merujuk kepada kuasa yang diberikan kepada Danaharta di bawah Akta, Akta hanya boleh berfungsi berkaitan aset yang di mana Danaharta bersetuju untuk memperoleh (lihat perenggan 21–22).

A (5) Dalam kes ini, tidak dapat perjanjian untuk meletakhakkan hak milik undang-undang. Walaupun perjanjian membentuk amanah mutlak yang memihak kepada Danaharta, memberikan ia kepada hak di bawah caj dan surat kuasa wakil, ia tidak memberikan hak kepada Danaharta untuk pelaksanaan spesifik terhadap pemindahan hutang B atau hak di bawah dokumen-dokumen tersebut (lihat perenggan 26); *Three Rivers District Council and others v Governor and Company of the Bank of England* [1996] QB 292 tidak diikut.]

Notes

C For cases on construction of terms of contract generally, see 3(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 3185–3298.

For cases on power given by Act, see 11 *Mallal's Digest* (4th Ed, 2008 Reissue) paras 1813–1815.

D **Cases referred to**

Three Rivers District Council and others v Governor and Company of the Bank of England [1996] QB 292, CA (not folld)

E **Legislation referred to**

Judicature Act 1873 [UK]
Law of Property Act 1925 [UK]
Pengurusan Danaharta Nasional Berhad Act 1998 ss 14, 14(1), (3), Part V

F *Christopher Sawan (Ahmad Zakaria & Associates) for the appellant.*
Geetha Janardhanan (Abrahams Davidson & Co) for the respondent.

Davies JCA:

G

[1] This is an appeal against the judgment of the High Court given on 20 August 2009 in which the court made the following orders:

(a) A declaration that by virtue of a memorandum of charge dated 30 H November 1992 and a power of attorney dated 5 June 1990 a legal charge had been created in favour of the respondent by the first defendant over the subject property.

(b) That the respondent be at liberty to exercise its rights as legal chargee I to satisfy the outstanding debt of $173,872.03 together with interest at 9.5%pa to the date of full settlement together with costs on an indemnity basis.

(c) That the respondent be at liberty to sell the property by public tender or private treaty.

[2] There followed a number of consequential orders about the sale and transfer of the property and an order that the defendants deliver up vacant possession of the property.

[3] Only the second defendant in the action, Elsie Chong, has appealed to this court. We will describe her as the appellant and the respondent as the respondent.

[4] The facts relevant to this appeal are as follows.

[5] By letter of offer dated 19 March 1990, accepted by the appellant the same day the respondent granted to the appellant a banking facility by way of overdraft to the extent of $200,000. Repayment was secured by a third party charge over a property in the name of the first defendant, the husband of the appellant. That was the memorandum of charge dated 30 November 1992. It was executed by the appellant as attorney of the first defendant pursuant to a power of attorney dated 11 May 1990.

[6] Also on 5 June 1990 the first defendant executed a power of attorney in favour of the respondent to deal with the property including, in default of payment by the appellant, to sell the land without notice to him.

[7] The memorandum of charge and powers of attorney were duly registered.

[8] The appellant defaulted in payment under the facility and on 4 January 1996 the respondent obtained judgment against the appellant in the sum of $277,694.41 together with interest. After that the appellant made partial repayment but remained substantially in default; at the time of judgment in the sum of $173,872.03.

[9] On 28 March 2008 the respondent gave the first defendant notice of its intention to sell the property as it was required to do by the memorandum of charge. In her appeal against the above orders, the appellant makes the following submissions:

(a) that by a participation agreement between the respondent and Danaharta Managers Sdn Bhd and a deed of assignment between Danaharta and Hickham Capital Management Sdn Bhd the respondent had achieved 'an out and out cession' of the appellant's debt to those companies;

(b) that, in consequence of those documents, Danaharta, and then Hickham, became the owner of the debt and of the respondent's rights under the facility and the memorandum of charge;

A (c) that therefore these proceedings were incompetent because neither Hickham nor Danaharta had been made a party;

(d) that neither of these entities could have sued in Brunei because it was not registered in Brunei; and

B (e) that the respondent, having sold the debt, no longer retained the right to sue.

[10] In order to attempt to understand these submissions it is necessary first to analyse the participation agreement and the deed of assignment.

C

[11] Before doing this, however, we should point to some facts which may make this appeal, or much of it, futile. The appellant did not seek to stay the judgment appealed from. The respondent, as it was then entitled to under the orders under appeal, sold the property referred to above on 1 December 2009 D for the sum of $226,000 and on 3 March the purchaser paid the respondent the whole of that purchase price.

[12] It is not known whether the respondent has, in turn, paid on to E Danaharta or Hickham such part of that money as represents the debt and interest but, even now, there is no reason why it should not. We are told that no transfer pursuant to the sale has yet been registered but, again, there is no reason why it should not be.

F **[13]** It follows from all this that there cannot now be any effective appeal against the declaration or the orders relating to the sale of the property. However there may still be an appeal against the order for possession. For that reason we will consider the above argument.

G **[14]** The participation agreement was made on 11 October 1999. Its subject was a number of loans made by the respondent, including this one. Relevantly, by cl 4.4(1) of the agreement, Danaharta, on and from completion of the agreement:

H

(a) [became] liable for and assumed the risk in the Subject Loans and the Transaction Documents; and

(b) [acquired] the benefit to receive all payments received in respect of the Subject Loans and Transaction Documents.

I

[15] The 'Subject Loan' was relevantly defined as the credit facility made available to the defendants by the respondent and the 'Transaction Documents' were relevantly defined as any facility agreement and any charge entered into as security for repayment of the debt.

The agreement also provided:

(a) by section 4.4(3):

> On and from Completion [Danaharta] shall be entitled to the benefit of and to receive [the amount] of all payments received by [the respondent] from [the appellant] in respect of the Subject Loan ... [The respondent] shall promptly pay to [Danaharta]... all sums received by [the respondent] and shall hold such sums in trust for [Danaharta] until the sums are paid to it.

(b) by section 5.3:

> ... Nothing in this agreement operates as an assignment of [the respondent's] rights under or in connection with [the Transaction Documents]. [Danaharta] shall not deal directly or indirectly with [the defendants] in relation to the Subject Loan or any [Transaction Documents].

(c) by section 5.4(b):

> [The respondent] ceases to have any residual beneficial interest in the Subject Loan.
>
> ...

(d) by section 8.6:

> [Danaharta] may at any time assign any of its rights, or transfer any of its rights and obligations, under this agreement to any person.

[16] The effect of the participation agreement was to create a trust in favour of Danaharta of the beneficial interest in the debt owed to the respondent by the appellant and in the respondent's rights under the memorandum of charge and power of attorney in favour of the respondent referred to earlier. As between the parties to it, the beneficial interest in each passed to Danaharta but the legal interest remained with the respondent. It conferred no right on Danaharta against either defendant.

[17] By the deed of assignment between Danaharta and Hickham, Danaharta assigned its rights under the participation agreement to Hickham: see cl 2.1.

[18] The first premise of the appellant's argument in this court is that, by the above documents and the Pengurusan Danaharta Nasional Berhad Act 1998 (Malaysia), the respondent assigned to Danaharta and Danaharta assigned to Higham the respondent's right to sue either defendant in respect of the subject

A debt. Consequently, it was submitted, the respondent can no longer sue for the debt; and, as a suit by Danaharta or by Hickham would involve it in purporting to carry on business in Brunei where it was not registered, the debt cannot be recovered. Unless the appellant succeeds in making good that premise her appeal must fail.

B

[19] There is no ambiguity in the participation agreement. By it, the respondent did not purport to assign to Danaharta its right to the chose in action, the debt of the appellant, or its right to sue to recover that debt. Clause 5.3 specifically provided to the contrary. First, the respondent purported to C create a trust, in favour of Danaharta, in respect of its interest in the debt owed by the appellant and its rights under the facility agreement, the charge and the power of attorney. Secondly, as between the parties, Danaharta assumed the risks that the loan might not be repaid and that the security may not be sufficient to satisfy the debt. See cll 4.4(1) and 5.4(b). But it was plainly the D parties intention in cl 5.3 that the respondent retained the legal interests in all rights under the transaction documents.

[20] No doubt, as the holder of the whole beneficial interest in each of these, Danaharta could direct the respondent to act, under any of those documents, E in accordance with its directions, including, if necessary, compel the respondent to exercise any of its powers under those documents and, if it failed to do so, to act in its name to enforce them. But the respondent nevertheless remained, as between the parties, and as against the debtor, the legal owner of the debt and of all rights under those documents because that was the expressed F intention of the participation agreement.

[21] Nor does the above Act affect this. The Act cannot be used to construe the agreement. Part V, upon which the appellant relies, applies only to assets G acquired by Danaharta, that is, in the present case, the beneficial, but not the legal interest, in the appellant's debt and the beneficial, but not the legal interest in those documents. The provisions of s 14, upon which the appellant specifically relies, therefore apply only to those equitable interests. Section 14(1), when it permits Danaharta to acquire assets, can relevantly permit H acquisition only of the asset the acquisition of which the participation agreement provided for, namely an equitable interest in the debt and in the rights under the transaction documents. Consequently where s 14(3), for example, provides:

I (3) [Danaharta] shall, on and from the vesting date for an asset, acquire all of the seller's present and future rights, title and interest in ... such asset ...

[22] The asset referred to is an equitable, but not a legal interest in the loan and above documents. And the remaining provisions of that section should be

read accordingly. Mr Sawan, for the appellant, appeared to be seeking to construe the participation agreement by reference to the powers conferred on Danaharta under the Act. But the Act can operate, relevantly, only in respect of 'assets' which Danaharta has agreed to acquire.

[23] As Danaharta merely assigned to Higham the property which it acquired from the respondent, it follows that neither Danaharta nor Higham acquired the legal ownership or any legal interest of the respondent under the above documents or, because of cl 5.3, any right to demand it.

[24] However, because the appellant has referred to and relied on some authorities relating to assignments of choses in action including *Three Rivers District Council and others v Governor and Company of the Bank of England* [1996] QB 292, a decision of the English Court of Appeal on a practice point similar to that raised here, we should say something about such assignments in order to show how they must be distinguished from the effect of the participation agreement.

[25] Historically a debt could not be legally assigned and that remained the case until the Judicature Act 1873, later the Law of Property Act 1925 which became part of the law of Brunei. But they could always be assigned in equity if made for valuable consideration. A promise to assign property made for valuable consideration bound the conscience of the promisor to hold the property in trust for the promisee. This is because equity, in such a case, regarded as done that which ought to be done and held the promisee to have an equitable interest commensurate with the legal interest which specific performance of the promise would give him.

[26] However all of this arises from the promise to assign. Here there was no such promise. On the contrary, the agreement was that the property would remain in the legal ownership of the respondent. Consequently, although, by the participation agreement the trust in favour of Danaharta was an absolute one entitling it to the rights referred to earlier in this judgment, it did not entitle it to specific performance of a transfer of the debt or of the rights under the transaction documents because, not only was there no promise to assign legal title but that was contrary to the expressed intention of the parties.

[27] The practice referred to in *Three Rivers Council* followed from the fact that, as an equitable assignee of a debt for consideration was entitled to specific performance of the assignment, it was a proper party to an action against the debtor on the debt. For the reason given that is not relevant here.

[28] The judge was therefore right in concluding, as he did in effect, that the respondent retained and Danaharta did not acquire the right to sue for the debt

and to enforce the transaction documents. Consequently neither Danaharta nor Hickson was a proper party to this action.

[29] The appeal must therefore be dismissed.

ORDERS

[30] Appeal dismissed.

[31] Order that the appellant pay the respondent's costs.

Appeal dismissed with costs.

Reported by Andrew Christopher Simon